

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRACY WHITAKER	:	CIVIL ACTION
	:	
v.	:	
	:	
FRANK D. GILLIS, et al.	:	NO. 99-4578

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

March 20, 2000

Petitioner Tracy Whitaker ("Whitaker" or "petitioner") filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254. By order of October 12, 1999, the court referred the petition to United States Magistrate Judge Peter B. Scuderi ("Judge Scuderi"). Judge Scuderi filed a Report and Recommendation for dismissal of the petition; Whitaker filed a written Objection to the Recommendation, and the Commonwealth filed no response. On March 17, 2000, petitioner filed a motion for appointment of counsel. After de novo review of the Report and Recommendation, the Recommendation will be approved and the Objection will be overruled. The motion for appointment of counsel will be denied.

BACKGROUND

Whitaker was convicted in the Court of Common Pleas of Delaware County of first degree murder, aggravated assault, and endangering the welfare of children.¹ He was sentenced concurrently to life imprisonment and one to two years' imprisonment. Whitaker filed a direct appeal claiming:

¹ The facts set forth in this procedural history are adopted from Magistrate Judge Scuderi's Report and Recommendation.

1. The hearing court erred when it denied Whitaker's motion to suppress his statements to police since these statements were the product of a custodial interrogation and he was not given the benefit of Miranda warnings prior to the interrogation session;

2. The trial court erred when it permitted the Commonwealth to introduce into evidence a collection of photographs which depicted the body of the victim during its dissection at the autopsy; and

3. The trial court erred when it failed to require the Commonwealth to provide a specific and timely answer to Whitaker's requests for a Bill of Particulars and then permitted the Coroner to change his written opinion as to the time period within which the injuries were inflicted upon the victim.

On August 15, 1995, the Superior Court affirmed his conviction. The Supreme Court denied allocatur on January 26, 1996. On February 22, 1996 Whitaker received a letter from his public defender, Patrick J. Connors, Esq., stating in part "there are no further Appeals that I can take on your behalf." See Whitaker Written Objection Exh. D.

On October 22, 1997, nearly 22 months later, Whitaker, filing a pro se petition for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 et seq., claimed prosecutorial misconduct and ineffective assistance of trial and appellate counsel.² On

² Specifically, Whitaker claimed:

1. The prosecutor improperly expressed a personal opinion about defense witnesses;

2. The prosecutor improperly failed to correct Commonwealth witness Delise Mumford's "false" testimony;

3. Trial counsel was ineffective for failing to request that the jury be instructed that evidence of good character may be sufficient to raise a reasonable doubt and for failing to object to the prosecutor's request not to

November 12, 1997, the PCRA court appointed Hugh A. Donoghue, Esq., to represent Whitaker in his PCRA action; on the same day the court issued a Rule Returnable requiring Mr. Donoghue to provide legal justification why the PCRA petition should not be dismissed as untimely. Mr. Donoghue did not respond, and Whitaker's petition was dismissed without a hearing on December 15, 1997. On May 21, 1998, the Superior Court dismissed Whitaker's appeal for failure to file a brief, and his pro se petition for allowance of appeal was denied on March 5, 1999, by the Pennsylvania Supreme Court.

On September 13, 1999, Whitaker, filing the instant pro se petition for writ of habeas corpus, claimed various counts of prosecutorial misconduct, ineffectiveness of trial and PCRA counsel, trial and PCRA court error, and insufficiency of evidence to support a conviction of first degree murder.³ The

charge the jury with evidence of good character;

4. Trial counsel was ineffective for failing to impeach Commonwealth witness Delise Mumford;

5. Trial counsel was ineffective for failing to investigate, interview, and call a witness after Whitaker requested that he do so;

6. Trial counsel was ineffective for failing to object when the prosecutor improperly expressed his personal opinion; and

7. Appellate counsel was ineffective in failing to raise issues of prosecutorial misconduct and ineffective assistance of trial counsel on appeal.

³ Specifically, Whitaker claimed:

1. The prosecutor committed prosecutorial misconduct by expressing prejudicial and inflammatory remarks during his closing argument;

2. The prosecutor committed prosecutorial misconduct by failing to correct a Commonwealth witness;

Commonwealth responded that Whitaker's petition is time-barred under the Anti-Terrorism and Effective Death Penalty Act, procedurally defaulted, non-cognizable, or meritless.

DISCUSSION

I. Procedural Default and Exhaustion

A writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. See 28 U.S.C.A. § 2254(b)(1)(A). To exhaust available state

3. Trial counsel was ineffective for failing to object to prejudicial and inflammatory remarks during the prosecutor's arguments;

4. Trial counsel was ineffective for failing to request instructions that evidence of good character may be sufficient to raise a reasonable doubt and for failing to object to the prosecutor's request not to charge the jury with evidence of good character;

5. Trial counsel was ineffective for failing to impeach a testifying Commonwealth witness;

6. Trial counsel was ineffective for failing to investigate and call a witness;

7. Trial counsel was ineffective for failing to inform Whitaker of his right to waive a jury trial and for failing to communicate with Whitaker;

8. Appellate counsel was ineffective for failing to raise issues of prosecutorial misconduct and ineffective assistance of counsel

9. PCRA counsel was ineffective for failing to file a brief and show cause to the PCRA court as ordered;

10. The hearing court erred when it denied Whitaker's motion to suppress his statement to the police since these statements were the product of a custodial interrogation and Whitaker was not given the benefit of Miranda warnings;

11. The trial court erred when it permitted the Commonwealth to introduce into evidence a collection of photographs which depicted the body of the victim during its dissection at an autopsy;

12. The trial court erred when it failed to require the Commonwealth to provide a specific and timely answer to Whitaker's request for a Bill of Particulars and then permitted the Coroner to change his written opinion as to the time period within which the injuries were inflicted upon the victim; and

13. The evidence was insufficient to support the finding of first degree murder.

court remedies, petitioner must fairly present to the state courts all the claims made in his habeas corpus petition. See Henderson v. Frank, 155 F.3d 159, 164 (3d Cir. 1998); Wheeler v. Chesny, No. 98-5131, 2000 WL 124560, at *1 (E.D. Pa. Jan. 27, 2000). A petitioner who has raised an issue on direct appeal is not required to raise it again in a state post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). To satisfy the requirement of fair presentation, a petitioner's state court pleadings and briefs must demonstrate that he has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are "substantially equivalent" to those asserted in federal court. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996).

When a petition contains both exhausted and unexhausted claims, the district court must ordinarily dismiss for failure to exhaust state court remedies. Rose v. Lundy, 455 U.S. 509 (1981). But where returning to exhaust claims in state court would be futile because they are procedurally barred, the district court may decide the merits of the claims that are exhausted and not barred. Toulson v. Beyer, 987 F.2d 984, 986 (3d Cir. 1993) (citing Teague v. Lane, 489 U.S. 288 (1989)). The district court may consider the merits of the unexhausted, procedurally barred claims only if the petitioner shows good cause for the procedural default and prejudice, or actual

innocence. See Bousley v. United States, 118 S.Ct. 1604, 1611 (1998). If the district court is uncertain whether the state court would refuse to hear the claims because of a procedural bar, it should dismiss the petition without prejudice to give the state court a chance to hear the unexhausted claims in case they are not procedurally defaulted. See Toulson, 987 F.2d at 989; see 28 U.S.C. § 2254 (b).

Whitaker has exhausted his claims that he was subjected to: 1) custodial interrogation without the benefit of Miranda warnings; 2) trial court error in permitting the Commonwealth to introduce in evidence a collection of photographs depicting the body of the victim at the autopsy; and 3) trial court error in failing to require the Commonwealth to provide a specific and timely answer to Whitaker's requests for a Bill of Particulars, and permitting the Coroner to change his written opinion regarding the time period within which the injuries were inflicted upon the victim. Whitaker has not exhausted any other claims raised in his federal petition; they have never been considered on their merits by the Pennsylvania courts. Returning to state court to exhaust his claims would be futile because they are procedurally barred under the PCRA.

This court may not proceed to the merits of the unexhausted claims unless Whitaker shows good cause and prejudice or actual innocence.

In all cases in which a state prisoner has defaulted his

federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). To demonstrate cause for default, a petitioner must show that "some objective factor external to the defense impeded or prevented his ability to comply with state procedural rules." Wheeler v. Chesny, No. 98-5131, 2000 WL 124560, at *2 (E.D. Pa. Jan. 27, 2000) (citing Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992)). A fundamental miscarriage of justice occurs when the petitioner has "a colorable claim of actual innocence for the crime of which he was convicted or the sentence imposed." Wheeler, 2000 WL 124560, at *2.

Whitaker did not seek timely collateral relief; he claims his attorney misled him about further appeals after completing direct review of Whitaker's conviction and sentence. There is no constitutional right to an attorney in state post-conviction proceedings, see Pennsylvania v. Finley, 481 U.S. 551 (1987), so petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. Coleman, 501 U.S. at 752. Neither the conduct of Hugh A. Donoghue, Esq. nor Patrick J. Connors constitute "cause" because their relevant actions, inactions, or advice pertained to post-conviction proceedings. Whitaker has not established good cause.

To demonstrate a colorable claim of actual innocence, a prisoner must show "a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Sawyer v. Whitley, 505 U.S. 333, 339 (1992). This exception is "exceedingly narrow." See Tran v. Gillis, No. 98-532, 1999 WL 962539, at *7 (E.D. Pa. Oct. 21, 1999). Whitaker's petition for habeas corpus and his written objection does not assert grounds for a finding of actual innocence. Even if the allegedly objectionable evidence introduced at trial had been excluded, and the evidence petitioner sought to have introduced had been admitted, there is not a fair probability that the jury would have entertained a reasonable doubt of his guilt. Whitaker has not suggested that evidence available after trial demonstrates his actual innocence.

II. Period of limitation

Whitaker's three exhausted claims are subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See 28 U.S.C. § 2244. A one-year period of limitation applies to a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. See 28 U.S.C. § 2244(d)(1). The limitation period runs from the date on which judgment became final by the conclusion of direct review or the

expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1)(A); Jones v. Morton, 195 F.3d 153, 157 (3d Cir. 1999).⁴ If a defendant does not file a certiorari petition within 90 days of entry of judgment by the state Supreme Court, the judgment becomes final on the 91st day. See Supreme Court Rule 13; Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999). The Pennsylvania Supreme Court denied allocatur on Whitaker's direct appeal on January 26, 1996. Whitaker's conviction became final on April 26, 1996, when the 90 days for seeking certiorari review from the United States Supreme Court expired.

Whitaker had until April 28, 1997, one year after April 26, 1996, to challenge his state conviction in federal court.⁵ See 28 U.S.C. § 2244(d)(1). Whitaker filed his petition in federal court on September 13, 1999, over two years and four months after the limitation period expired.

Whitaker's October 22, 1997, petition for collateral relief under the PCRA did not affect the timeliness of his federal petition. 28 U.S.C. § 2244(d)(2) provides:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this

⁴ The other criteria for determining the date from which the limitation period runs pursuant to 28 U.S.C. § 2244(d)(1)(A)-(D) are inapplicable.

⁵ State prisoners whose convictions became final prior to April 24, 1996 had one year after the AEDPA effective date to file a federal habeas petition. See Gray v. Sobina, No. 97-CIV-4978, 1998 WL 167279, at *2 (E.D. Pa. Apr. 13, 1998), citing Burns v. Morton, 134 F.3d 109, 112-13 (3d Cir. 1998).

subsection.

In considering whether a petition for post-conviction relief is properly filed, "district courts should not inquire into its merits." See Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). A properly filed application need not necessarily be non-frivolous. Id. A properly filed application is one "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Id. Pennsylvania law requires any PCRA petition to "be filed within one year of the date the judgment becomes final." 42 Pa. C.S. §9545(b)(1). There are exceptions to application of the one year limitation, but none apply to Whitaker. See 42 Pa. C.S. § 9545(b)(1)(i)-(iii). Whitaker's October 22, 1997, petition was not "properly filed" according to Pennsylvania's procedural requirements, and he has not argued that it was.

A petitioner is not time-barred if "principles of equity would make the rigid application of a limitations period unfair" and the petitioner "exercised reasonable diligence in investigating and bringing the claims." Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998) (citations omitted). Whitaker did not exercise reasonable diligence investigating and timely raising his claims before the PCRA court or this court. Whitaker claims he relied to his detriment on his public defender's assertion that he could take no further appeals. A reasonable reading of Patrick J. Connors's

letter is that the Public Defender could take no further appeals, not that no further appeals were available to Whitaker. Whitaker misunderstood and relied on Mr. Connors's February 22, 1996 letter, but that is not sufficient to toll the limitation period. Equitable tolling does not except Whitaker from the limitations bar.

CONCLUSION

Whitaker's unexhausted habeas corpus claims cannot be considered, and the Pennsylvania and Federal statutes of limitation preclude substantive consideration of Whitaker's exhausted claims. Neither equitable tolling nor statutory tolling apply.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRACY WHITAKER : CIVIL ACTION
:
v. :
:
FRANK D. GILLIS, et al. : NO. 99-4578

ORDER

AND NOW this 20th day of March, 2000, after careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and the motion for appointment of counsel, after review of the Report and Recommendation of Magistrate Judge Scuderi, and petitioner's written objection thereto, and in accordance with the attached memorandum,

it is **ORDERED** that:

1. The Motion for Appointment of Counsel is **DENIED** under 28 U.S.C. § 1915(e)(1).

2. The petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED**.

3. The Recommendation of Magistrate Judge Scuderi is **APPROVED**. The Report is approved to the extent consistent with the court's Memorandum accompanying this Order. Mr. Whitaker's written objection is **OVERRULED**.

4. There is no basis for the issuance of a certificate of appealability.

Norma L. Shapiro, S.J.